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No. 699

In the Supreme Court of the United States

October Term, 1963

SHAFIQ KAMAL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 699

SHAFFIQ KASSAB, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 322 F. 2d 824.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 24, 1963. The petition for a writ of certiorari was filed on December 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for review of petitioner's deportation order was timely filed.

2. Whether petitioner exhausted his administrative remedies before asking for judicial review of his deportation order.

STATUTES AND REGULATIONS INVOLVED

Section 106 of the Immigration and Nationality Act, as added by Sec. 5(a) of the Act of September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. IV) 1105a), provides pertinently:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.
>
> * * * * *
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations * * *.

Section 241(a) of the Immigration and Nationality Act, 66 Stat. 204 (8 U.S.C. 1251(a)) provides pertinently:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States.

* * * * *

8 C.F.R. 242.18 provided as follows:

The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without preexamination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

8 C.F.R. 242.20 provided as follows:

The order of the special inquiry officer shall be final except when the case has been certified as provided in § 6.1(c) or § 7.1(b) of this chapter, or an appeal is taken the Board of Immigration Appeals by the respondent or by the examining officer.

STATEMENT

Petitioner, a native of Iraq and a citizen of Israel, while visiting members of his family in the United States, married an alien from his native country in November, 1958 (R. 3, 8, 11, 17, 20, 23). He returned to Israel immediately thereafter and applied for an immigrant's visa. A few months later, he received a letter from his lawyer in Los Angeles asking him to return in connection with his case and a telegram

advising that his father was very ill. He applied for and received a visitor's visa from the American consul at Amsterdam authorizing him to enter and remain in the United States until January 7, 1961. On or about June 1, 1959, he entered this country (R. 11-12, 8, 23). On September 29, 1960, petitioner applied for classification as a permanent resident alien. This was denied on October 31, 1960, on the ground that no visa was available for petitioner (R. 18, 40). On December 8, 1960, petitioner received a letter from the Immigration and Naturalization Service informing him that his application for extension of time to depart from the United States had been denied and instructing him to depart the United States by January 7, 1961. Petitioner sought reconsideration of his application. He submitted the letter of a physician caring for his wife, stating that she was in danger of a miscarriage arising from an accident and needed the presence of her husband, and a letter from his attorney stating that petitioner had an action for damages arising from an accident which had occurred on October 11, 1958, which was scheduled for trial on January 30, 1961 (R. 24-27).

On January 19, 1961, an order to show cause was issued giving notice of hearing as to why petitioner should not be deported under Section 241(a)(2) of the Immigration and Nationality Act in that, as a visitor, he had remained in the United States for a longer time than was permitted (R. 23). At the hearing on February 7, 1961, before a special inquiry officer at Los Angeles, petitioner appeared with retained counsel, admitted his deportability, and re-

quested that, if deportation were ordered, he be sent to Israel (R. 8–9). Petitioner requested the privilege of voluntary departure at his own expense at any time prior to October 1, 1961. When the special inquiry officer stated that he did not have authority to fix the departure date, petitioner's counsel expressed willingness to amend the application so as not to specify the date (R. 9–10). The testimony of petitioner was then heard as to the circumstances of his presence in this country and his reasons for wishing a delay in his departure date (R. 10–21). Petitioner was asked (R. 17):

> Q. Now, regarding voluntary departure from the United States, how soon could you leave?
>
> A. As soon as possible.
>
> Q. Well now, what do you call possible. Would you be able to leave within a week?
>
> A. As soon as the director will direct me to leave.
>
> Q. In other words, if you are granted voluntary departure you will leave the United States in whatever time is fixed for you by the District Director of this Service?
>
> A. Yes.

The government stated that it was not opposed to the granting of voluntary departure but was not convinced that petitioner would truly leave with reasonable promptness; accordingly, it asked that the special inquiry officer give his decision (R. 21). Recounting the circumstances impelling petitioner's desire for delay and his expressed willingness to depart when ordered to do so, the officer ordered that the privilege of voluntary departure be granted within such time

as should be specified by the district director, but that if petitioner should fail to comply therewith, he should be deported without further hearing (R. 3–5). Petitioner acknowledged that he understood the decision and his counsel stated that no appeal would be taken. The special inquiry officer announced that the decision thus became final (R. 22).

By letter of June 15, 1961, the Immigration and Naturalization Service advised petitioner that since a private bill on his behalf was under consideration in Congress, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A–1; Pet. App. 3). By letter of December 18, 1961, signed by the assistant district director, the Immigration Service informed petitioner that if he did not depart by August 1, 1962, his "deportation has been directed to the country indicated in the attached Form * * * [Israel]" (Ex. A–2 and Ex. A–3; R. 35; Pet. App. 3–4). By letter of June 15, 1962, the Service notified petitioner that he would be permitted to remain in the United States until February 1, 1963, or until thirty days after adverse action on the pending private bill, whichever occurred sooner (Ex. A–4; Pet. App. 4). Later, the time was extended until March 3, 1963. On May 3, 1963, a petition for review was filed with the Court of Appeals for the Ninth Circuit alleging that petitioner's consent to voluntary departure was procured under threat of deportation; that petitioner had been granted an immigration visa on the petition of his wife, who had been lawfully admitted to the United States for permanent residence; that a child had been born to them after petitioner took up permanent resi-

dence with his wife; that proceedings were in progress to deport his wife and that it was for this reason that petitioner was threatened with deportation. It was also alleged that the petition for review was timely because on December 18, 1961, petitioner was notified by the assistant district director that if he failed to depart by August 1, 1962, or any authorized extension thereof, his deportation to Israel had been directed; that such departure was successively extended to March 3, 1963; and that the notice to petitioner dated December 18, 1961, was in legal effect a final deportation order effective March 3, 1963, and reviewable as such (R. 29–34, 35).

The court of appeals denied the petition for review, on the grounds that it had not been seasonably filed and that petitioner had failed to exhaust his administrative remedies by appealing from the decision of the special inquiry officer (Pet. App. 2–7).

ARGUMENT

1. The court of appeals held that the petition for review was untimely in that it was filed (a) more than six months after the special inquiry officer's deportation order of February 7, 1961, and (b) more than six months after October 26, 1961, the date on which § 106(a) of the Immigration and Nationality Act became effective. Petitioner argues that the February 7, 1961, order was not a "final deportation order" within the meaning of § 106(a)(1), and therefore did not set in motion the statutory six-month period, since it did not specify the time of deportation or the destination country. He maintains that the

final and reviewable deportation order was the assistant district director's letter of December 18, 1961, which became effective, after extensions, on March 3, 1963. There is no substance to petitioner's contentions.

Under the current administrative procedure, established by the amended regulations of January 22, 1962, the special inquiry officer designates the country of deportation in the final order which culminates the deportation proceeding itself. At the time this case arose, however, the selection of the place of deportation was customarily postponed until after the termination of the deportation hearings, and was made by an official other than the special inquiry officer. Gordon and Rosenfield, *Immigration Law and Procedure* (1963 loose-leaf ed.) pp. 552.3, 601, 873. No one doubted, however, that the special inquiry officer's decision was a final order as to all issues covered by it. The regulations expressly so provided (8 C.F.R. 242.20), and, prior to the enactment of § 106(a) in September 1961, such orders were regularly reviewable in the district courts under § 10 of the Administrative Procedure Act (5 U.S.C. 1009). Gordon and Rosenfield, *op. cit. supra*, p. 873.

Prior to the 1961 amendments, an ancillary order fixing the place of deportation was separately reviewable in the district court as a "final agency action" under § 10(c) of the Administrative Procedure Act. *Ibid.* Cf. *Lezos* v. *Landon*, 235 F. 2d 581 (C.A. 9); *Tsiang Hsi Tseng* v. *Del Guercio*, 148 F. Supp. 803 (S.D. Cal.). Such an order, however, is not a "final order of deportation" within the meaning of § 106(a).

Any doubt on that score that may have been created by *Rogmeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921, and *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7), was laid to rest by this Court in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217. The holding in that case was that not only the determination of deportability, but all determinations made by the special inquiry officer as an integral part of the deportation hearing and reflected in his final deportation order, are reviewable in the courts of appeals under § 106(a). The Court further stated, however, that ancillary determinations made by other officers subsequent to the deportation hearing are not covered by that provision. Thus, the Court declared (375 U.S. at 230, fn. 16):

> When § 106(a) was enacted, the withholding of deportation under § 243(h) was a matter determined by an official other than the special inquiry officer conduc[t]ing the deportation hearing, on a later occasion, under regulations promulgated by the Attorney General, *and the designation of the country of deportation was not made until after the issuance of the warrant of deportation. Under revised and currently effective regulations, both the designation of the country of deportation and the decision on any § 243(h) request for relief which the alien might wish to make are effected in the deportation proceedings and reflected in the final order of deportation. While presumably denials of § 243(h) relief were not covered by § 106(a) at the time of its enactment*, it does not seem incongruous to assume that such

> orders, because of the change in administrative regulations making such decisions an integral part of the deportation proceedings conducted by a special inquiry officer, are now within the reach of § 106(a)'s judicial review provisions. Such a result simply means that, while the jurisdiction of the Courts of Appeals is limited now, as when § 106(a) was enacted, to the review of "all final orders of deportation," a change in the administrative regulations relating to the processing and determination of applications for § 243(h) relief had the incidental effect of expanding the decisional content of such orders. Clearly, changes in administrative procedures may affect the scope and content of various types of agency orders, and thusly the subject matter embraced in a judicial proceeding to review such orders. [Emphasis added.]

This is not to say, of course, that an ancillary order, issued under the old procedure, designating the country of deportation is not subject to judicial review at all. Such an order may be challenged in the district court under the Administrative Procedure Act, just as it could be prior to the enactment of § 106(a). Cf. *Zupicich* v. *Esperdy*, 319 F. 2d 773 (C.A. 2), pending on certiorari in No. 669 Misc., this Term. But since Israel was the country which petitioner himself requested, it is clear that on the facts of this case, there is no basis for challenging the district director's designation of that country in the December 18, 1961 order.

2. The foregoing considerations dispose of the contention that the district director's notice of December 18, 1961, was a "final deportation order" or was essen-

tial to the finality of the special inquiry officer's order. There remains the possible contention—not squarely raised by petitioner or passed upon by the court of appeals (although implicit, perhaps, in the Questions Presented (Pet. 2))—that the final order entered on February 7, 1961, did not become effective until March 3, 1963, because (a) by its own terms it was to take effect only after "respondent fails to depart [voluntarily] when and as required" (R. 2–3), and (b) there is no indication in the record that, prior to March 3, 1963, petitioner disobeyed the terms of an explicit departure order.[1] We believe that such an argument is untenable—*i.e.*, that the adjudication of deportability became final and reviewable in February 1961, even though its operative effect and ministerial execution remained contingent. *Foti* v. *Immigration Service*, *supra*, 375 U.S. at 219, fn. 1. However, it is unnecessary to reach that question here. For even if the petition for review were timely on the theory just suggested, the Ninth Circuit's disclaimer of jurisdiction was still plainly correct on the independent ground that petitioner failed to exhaust his administrative remedies.

Under the regulations, the decision of a special inquiry officer in a deportation case may be appealed with-

[1] On June 15, 1961, the Service advised petitioner that, since Congress was considering a private bill in his behalf, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A–1; Pet. App. 3). The notice of December 18, 1961 reiterated that petitioner would be deported if he did not leave voluntarily by August 1, 1962. Successive notices extended the time to March 3, 1963.

in ten days to the Board of Immigration Appeals (8 C.F.R. § 3.1(b)(2)). At no time did petitioner exercise his right of appeal. Accordingly, since Section 106(c) of the Immigration and Nationality Act, adopted in September 1961, forbids the courts of appeals to review any order of deportation "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations," the court below plainly lacked jurisdiction of this cause. See *Siaba-Fernandez* v. *Rosenberg*, 302 F. 2d 139 (C.A. 9); *Mai Kai Fong* v. *Immigration and Naturalization Service*, 305 F. 2d 239, 242 (C.A. 9); *Murillo-Aguilera* v. *Immigration and Naturalization Service*, 313 F. 2d 141 (C.A. 9).[2] Indeed, this jurisdictional infirmity would have been present even if the doctrine of exhaustion had not been written into the statute. As a rule fashioned by the courts to avoid unnecessary interruption of the administrative process and superfluous judicial review, it had been applied to immigration matters even before the 1961 amendments. *United States* v.

[2] *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921, cited by petitioner, is distinguishable. There the court held that petitioner's failure to take an administrative appeal from the district director's refusal to grant him a first-perference visa—a discretionary order which the court held to be ancillary to the deportation orders issued against petitioner by the special inquiry officer—did not preclude judicial review under Section 106(a). The basis for that decision, however was that the petition for review was not a direct attack upon the deportation orders *per se*, but related exclusively to an ancillary matter. If, as in the present case, the petitioner had been challenging the determination of deportability itself, the Seventh Circuit would undoubtedly have reached a different result.

Sing Tuck, 194 U.S. 161; *Batista* v. *Nicolls*, 213 F. 2d 20 (C.A. 1). Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Falbo* v. *United States*, 320 U.S. 549.

This case presents no circumstances which would warrant relaxation of the rule of exhaustion. There is not the slightest doubt as to petitioner's deportability. It is conceded that he last entered the United States in June 1959 under a visitor's visa authorizing him to remain until January 7, 1961, and that he overstayed his appointed time. A nonimmigrant who remains in the United States longer than he has been authorized is subject to deportation (*Philippides* v. *Day*, 283 U.S. 48 (1931); *Mesina* v. *Rosenberg*, 278 F. 2d 291 (C.A. 9); *Masahiko Inouye* v. *Carr*, 89 F. 2d 447 (C.A. 9); *Tatsumi Masuda* v. *Nagle*, 55 F. 2d 623 (C.A. 9)). Indeed, at the hearing before the special inquiry officer, petitioner expressly admitted that he was deportable. The only question at issue was whether he should be accorded the privilege of voluntary departure, and on that question he prevailed.

Petitioner now maintains that, even though he last entered the country on a visitor's visa, he is entitled to remain, since the district director of the Service had earlier approved an application for an immigrant visa filed on petitioner's behalf by his wife (Pet. 3). But the approval of such an application merely constitutes a finding that the would-be immigrant is qualified for preferred status under § 203(a)(3) of the Immigration and Nationality Act; the determination of general admissibility must still be made by a consular officer, who alone has authority to issue a visa. §§ 104(a) and 221(a) of the Immigration and Nation-

ality Act; Gordon and Rosenfield, *Immigration Law and Procedure*, pp. 320–321, 329–330. Petitioner testified at the deportation hearing that he had applied "around December 1958" to the American Consul in Israel for an immigrant visa, but had not been granted one (R. 11–12).

Finally, the allegation that the Immigration Service was seeking to deport petitioner "ostensibly for overstaying his visitor's permit, but actually" because the Service had already taken steps to rescind his wife's permanent resident status (Pet. 3) is completely without foundation either in the record or outside of it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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